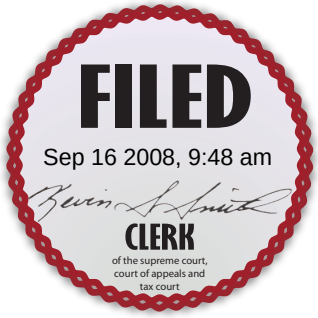

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IN THE
COURT OF APPEALS OF INDIANA

KEVIN BOESE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 17A03-0804-CR-214
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEKALB SUPERIOR COURT
The Honorable Kevin P. Wallace, Judge
Cause No. 17D01-0603-FC-17

September 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Kevin Boese appeals the four-year advisory sentence imposed by the trial court after he pleaded guilty to one count of sexual misconduct with a minor, a class C felony.

We affirm.

ISSUES

1. Whether the trial court abused its discretion in ordering Boese to serve a four-year sentence.

2. Whether the sentence imposed is inappropriate.

FACTS

We previously summarized the facts that preceded Boese's initial sentencing as follows:

> On March 24, 2006, the State charged Boese with committing the offense of sexual misconduct with a minor, a class C felony. Specifically, the information alleged that between August 1 and September 15, 2005, Boese (born September 6, 1984) had sexual intercourse with J.P., who was born April 26, 1990.
>
> On February 2, 2007, Boese tendered to the trial court his written plea agreement with the State. Therein, Boese agreed that "in consideration of the State . . . not enhanc[ing] the charge to the B felony level and agree[ing] to cap all executed time at 4 years," he "wish[ed] to plead guilty to the charge" of sexual misconduct with a minor, a class C felony. (App. 20). . . . . At the hearing on that date, Boese admitted that he had had sexual intercourse with J.P. when he knew that she was fifteen years of age, and that at that time he was twenty years of age. Boese further admitted to the trial court that he had been on probation at that time. The trial court took the plea agreement under advisement and ordered a pre-sentence investigation ("PSI").
>
> At the outset of the sentencing hearing on March 19, 2007, the trial court stated that having received and reviewed the PSI, it accepted Boese's plea. Megan Smith testified that she had married Boese in October of 2005 and was pregnant with his child. She further testified that although Boese was unemployed, he was seeking employment. Further, Smith testified that Boese helped her around their home and with her three-year-old son, and

> that she would need his assistance after giving birth to their child. Finally, Smith testified that Boese's paternity of J.P.'s child had not been established, inasmuch as his counsel had told him "to wait to take the DNA until it was court-ordered," and that court-ordered testing was scheduled for the next week. (Tr. 20). Boese's counsel asked that any sentence imposed be suspended. The State argued that Boese should serve an executed sentence.

Boese v. State, No. 17A03-0704-CR-180, slip op. at 2-3 (Ind. Ct. App. Dec. 6, 2007).

The trial court ordered Boese to serve a four-year executed sentence. He appealed. We noted that sentencing had been conducted "without the benefit of *Anglemyer*." Slip op. at 5. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007) ("*Anglemyer I*"), *clarified on reh'g on other grounds*, 875 N.E.2d 218 (Ind. 2007). ("*Anglemyer II*"), was issued three months after the trial court sentenced Boese, and held that appellate review required the trial court to specify "reasons for imposing the sentence" in a statement of facts "peculiar to the particular defendant and the crime." *Boese* slip op. at 5. Therefore, we found that the trial court had abused its discretion by failing to specify in a sentencing statement its reasons for imposing the four-year sentence. We remanded for entry of a sentencing statement.

On March 5, 2008, the trial court convened a second sentencing hearing. It stated that it had reviewed the transcript of the initial sentencing hearing and had reviewed Boese's PSI. No evidence was presented at this hearing.

Boese's counsel asked the trial court to recognize as mitigators "that he accepted his responsibility for his actions, that he was willing to provide restitution and certainly support for the child . . . born to the victim"; that his incarceration "would create an undue hardship on his child" by Ms. Smith; and that he had suffered learning disabilities

that caused "difficulties in his education." (Tr. 4). Boese's counsel asserted that the trial court should "recognize those things as mitigators and find that they outweigh the only" possible aggravator, "his minimal prior criminal history," and order "a suspended sentence" or "time served." *Id.*

The State asserted that the probation officer's recommendation -- of "six years with four years served," (App. 64) -- was "reasonable" based upon the information contained in the PSI. (Tr. 5). The State suggested as an alternative that the trial court simply sentence Boese to serve the four-year advisory term.

The trial court orally discussed several statutory factors. First, it found Boese had "a history of criminal behavior," noting that at the time Boese committed this offense, there had been two separate criminal actions pending against him. (Tr. 7). The trial court further noted that before the initial sentencing, Boese had pleaded guilty to one misdemeanor count of marijuana possession, and he had been placed on probation for that offense and then violated his probation.

Next, the trial court found that the hardship suffered by Boese's wife and their child due to his incarceration was "pretty typical hardship," noting that "everybody who goes to jail leaves loved ones who were relying on that person" in some fashion. *Id.* As to Boese's "acceptance of responsibilities and the difficulties in education," the trial court found that such were not circumstances that make his commission of sexual misconduct with a minor "unlikely to recur." (Tr. 7, 8).

The trial court stated that although it did not "find any mitigating circumstances at all, . . . to the extent that there [were] mitigating circumstances, they [were] at least

counter-balanced by the aggravating circumstances . . . mentioned." (Tr. 8). The trial court then imposed the advisory sentence of four years.

DECISION

1. Abuse of Discretion

Sentencing decisions rest within the sound discretion of the trial court. *Anglemyer I*, 868 N.E.2d at 490. Accordingly, sentencing decisions "are reviewed on appeal only for an abuse of discretion." *Id.*

"One way in which a trial court may abuse its discretion" is by finding aggravating factors as reasons for imposing a sentence, "but the record does not support the reasons." *Id.* Boese argues that here the trial court committed such an abuse of discretion because the "record does not support" two aggravating circumstances found, namely his criminal history and that he violated the conditions of probation in another case. Boese's Br. at 14. We cannot agree.

First, Boese argues that the trial court erred by considering as part of his criminal history the fact that two felony cases were pending against him at the time he committed this offense. He reminds us that as the trial court noted, he was subsequently acquitted of one of those offenses, and he cites *McNew v. State*, 391 N.E.2d 607 (Ind. 1979), for the proposition that an acquittal may not be considered an aggravating factor. However, our Supreme Court has more recently held that it "is proper for a trial court to consider at sentencing charges which have . . . resulted in acquittals as part of the criminal history of the defendant." *Valentin v. State*, 567 N.E.2d 792, 797 (Ind. 1991). Moreover, it is also undisputed that Boese had pleaded guilty to possession of marijuana, the lesser charge in

the other criminal case pending against him at the time Boese committed this offense; and in the PSI, Boese admitted that he smoked marijuana "heavily and consistently" for several years before this offense. (App. 62). The record supports the trial court's finding that Boese's criminal history was an aggravating factor. Therefore, the trial court did not abuse its discretion in so finding.

Next, Boese argues that the trial court abused its discretion when it found as an aggravating factor that he violated probation because the record does not "indicate that any court found that Boese had violated the terms of probation or that any court had revoked his probation." Boese's Br. at 6. However, the PSI expressly states as to Boese's "prior legal history" that in the criminal case leading to Boese's plea of guilty to possession of marijuana, he was given a one-year suspended sentence and "placed on probation for 1 year"; on three subsequent dates, petitions to revoke probation were filed; and "[a]s a result of the violations [Boese] spent 12 days in" jail and "continue[d]" to be on probation when the PSI was written. (App. 55). That Boese was ordered to serve twelve days in jail after the filing of three petitions to revoke his probation necessarily requires that a trial court found that he had violated the terms of his probation. *See* Ind. Code § 35-58-2-3(d) and (g) (trial court hearing upon petition to revoke; order to execute all or portion of suspended sentence upon finding of violation).

Boese also argues that the trial court abused its discretion by not finding his guilty plea to be a mitigating factor. A trial court abuses its discretion at sentencing when it fails to consider the fact that the defendant pleaded guilty, even when that fact was not expressly argued at the sentencing hearing. *Anglemyer II*, 875 N.E.2d at 220. An

allegation that the trial court "failed to identify or find a mitigating factor requires that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant." *Id.* However, "the significance of a guilty plea as a mitigating factor varies from case to case." *Id.* at 221. Thus, "a guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility, or when the defendant receives a substantial benefit in return for the plea." *Id.* (internal citations omitted).

Anglemyer II found no abuse of discretion in the trial court not finding Anglemyer's guilty plea to be a mitigating factor after noting that the plea agreement limited his maximum sentence to a term twelve years less than the potential maximum term absent such an agreement, and that the plea "was 'more likely the result of pragmatism than acceptance of responsibility and remorse'" inasmuch as "the evidence against Anglemyer was overwhelming." *Id.* Here, Boese had originally been charged with sexual misconduct with a minor as a class B felony, exposing him to a possible maximum sentence of twenty years. *See* I. C. § 35-50-2-4.[1] Pursuant to his plea of guilty to the offense of sexual misconduct with a minor as a class C felony, and with a maximum executed sentence of four years pursuant to the plea agreement, Boese limited his maximum sentence to a term that was sixteen years less. Thus, Boese received "a benefit" for his plea. *Anglemyer II*, 875 N.E.2d at 221. Further, Boese's date of birth is

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[1] Sexual misconduct with a minor is defined as engaging in certain sexual acts with a child "at least fourteen (14) years of age but less than sixteen (16) years of age." I. C. § 35-42-4-9(a). The offense is a class C felony unless it is committed by "a person at least twenty-one years of age," in which case it is a class B felony. *Id.*

September 6, 1984; the victim indicated that Boese first had sex with her on approximately August 23, 2004, and had sex with her an additional nine times. Further, Boese wrote to the victim that he faced a possible sentence of twenty years. Hence, the record supports the conclusion that Boese's guilty plea was more likely the result of pragmatism than acceptance of responsibility.

Finally, Boese argues that the trial court erred when it did not find as mitigating factors the hardship to Ms. Smith and their child posed by his incarceration, and his educational difficulties. Here, Boese advanced these for the trial court's consideration as mitigators. The trial court addressed them, but its remarks suggest that neither was found "significant." *See Anglemyer I*, 868 N.E.2d at 490; *Anglemyer II*, 875 N.E.2d at 221. Moreover, the trial court then noted that "to the extent that there [were] mitigating circumstances, they [were] at least counter-balanced by the aggravating circumstances . . . mentioned." (Tr. 8). There can be no appellate argument as to the "proper[] weigh[ing]" of aggravating and mitigating factors against each other by the trial court in imposing sentence. *Anglemyer I*, 868 N.E.2d at 491.

We do not find that the trial court abused its discretion when it sentenced Boese to the four-year advisory term for the class C felony offense.

2. Inappropriate Sentence

Although a trial court may have acted within its lawful discretion in determining a sentence, we may nevertheless consider whether "the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Id.* (quoting Indiana

Appellate Rule 7(B)). The burden is upon the defendant to persuade us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1081 (Ind. 2006)).

Boese argues that the four-year sentence imposed was inappropriate based on the nature of the offense and the character of the offender. He reminds us that his "prior criminal history was minimal," and asserts that the "nature of the offense is no more serious than other incidents resulting in the same conviction." Boese's Br. at 21. With respect to the latter, we note that what Boese received was the advisory sentence, *i.e.* "the starting point the Legislature has selected as an appropriate sentence for the crime committed." *Childress*, 848 N.E.2d at 1080, 1081. Moreover, as in *Childress*, most of Boese's argument on this issue focuses "not upon the 'nature of the offense and the character of the offender' but rather upon alleged trial court error in failing to consider purported mitigating factors." *Id.* at 1080.

At the time he committed the criminal offense to which he pleaded guilty, Boese had two separate felony criminal cases pending against him. Further, Boese pleaded guilty to the offense of marijuana possession, as a class A misdemeanor, and he admitted to having heavily and consistently used marijuana over a period of several years. These facts do not speak well of Boese's character.

According to Boese's statement to the probation officer, J.P.'s parents were gracious to him. Yet Boese, proceeded to engage in at least one criminal sexual act with their fifteen-year-old daughter, who was more than five years younger than himself. These facts do not render Boese's offense to be of a less serious nature than the statutory definition.

We do not find that the character of Boese and the nature of the offense he committed are such that the four-year advisory term imposed is inappropriate.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.